No. 224.

APR 11 1902
JAMES H. McKENNEY, Clerk

Supreme Court of the United States,

OCTOBER TERM, 1901.

Brf. of Soley for D. C.

No. 224.

UNITED STATES OF AMERICA,
Plaintiff in Error,

Filed Apr. 11, 1902.

vs.

EDWARD J. FREEL, AS EXECUTOR, ETC., IMPLEADED WITH JOHN GILLIES ET AL.,
Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief on behalf of Defendant in Error Edward J. Freel, as Executor, etc.

JAMES RUSSELL SOLEY,
Of Counsel,
For Defendant in Error Edward J. Freel.

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UNITED STATES OF AMERICA,
Plaintiff in Error,

against

EDWARD J. FREEL, as Executor, etc., impleaded with John Gillies *et al.*,
Defendant in Error.

Brief for the Defendant in Error, Edward J. Freel, as Executor, etc.

This case comes before this Court upon a writ of error to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court (Transcript, p. 32) affirming a judgment of the Circuit Court of the United States for the Eastern District of New York rendered on the demurrer of the defendant Edward J. Freel, as executor, to the complaint of the plaintiff, the United States, the demurrer proceeding upon the ground that the complaint does not state facts sufficient to constitute a cause of action against this defendant.

The action is one for damages against the defendant Gillies on the ground of his alleged breach of a certain contract to build a dry dock. It is also brought against Gillies' bondsmen under the contract, one of whom was the testator of the present defendant in error. The courts below decided in effect that by reason of changes in the primary contract the surety was absolved from liability. The question here presented is upon this decision.

Facts.

The claim of the Government against the sureties is stated in the fourth paragraph of the complaint (p. 1), where it is alleged that they, on November 17, 1892, entered into an agreement with the Government in the nature of a bond, on which they became liable to the Government unless Gillies should "well and truly perform the *stipulations* of the contract *of even date herewith.*" It is not alleged in the complaint, and it is not the fact, that the sureties were *parties* to Gillies' contract with the Government. It is not alleged in the complaint, nor is it the fact, that the terms of Gillies' contract were made a part of the bond. It is not alleged in the complaint, and it is not the fact, that the sureties at any time after November 17, 1892, made any other agreement with the Government in relation to these matters. But it is alleged in the complaint, and it is the fact, that Gillies and the Government thereafter agreed to certain changes in this original contract, the original contract being thereby abandoned by mutual consent.

The sole liability of the sureties was to see that Gillies should well and truly do what he had agreed to do by a contract between himself and the Government of November 17, 1892. This primary contract between Gillies and the Government is annexed to the complaint

and marked "Exhibit A" (p. 4). The fundamental and underlying provision of that contract is as follows (p. 4):

> "*First*—The contractor will, within twenty days after he shall have been tendered the possession and occupancy of the site by the party of the second part * * * commence, and within twenty-seven calendar months from such date construct and complete, ready to receive vessels, a timber dry dock to be located at such place *on the water line* of the Navy Yard, Brooklyn, New York, as shall be designated by the party of the second part."

On the 16th day of June, 1893, and therefore seven months after the making of the contract, an agreement was entered into between the contractor and the United States to lengthen the dry dock from 600 feet, as called for in the specifications, to 670 feet. This supplemental contract (Ex. B) will be found at page 10. It provided for additional compensation and an extension of time for the completion of the dock. It increased the work of the contractor by 12 per cent. and was a change of such magnitude as to call for an additional compensation of $45,556.

In August, 1893, a second change was made of a most important character. This was in the *location* of the dry dock. Article I. of the contract provided, as stated, that the dock should "be located at such place *on the water line* of the Navy Yard, Brooklyn, N. Y., as shall be designated by the party of the second part." At the time this primary contract of November 17, 1892, was entered into, the party of the second part, that is, the Government, had designated the location of the dock, as provided in Article First, and had caused it to be laid down and staked out. This first location, on the water line, so laid down and staked out at the time of the

primary contract, continued to be the location of the dock until August 17, 1893, that is to say, for nine months. Under the provisions of Article I., the work was to begin within twenty days after the contractor "shall have been tendered the possession and occupancy of the site." And this "possession and occupancy of the said site during the period of construction and until the completion and delivery of the work hereinafter mentioned, shall be secured to the contractor by the party of the second part" (p. 4).

The second supplemental contract, dated August 17, 1893, providing for the change of location (Exhibit C, p. 11), recites that "it has been deemed desirable *to change the location of the dry dock now being constructed* at the U. S. Navy Yard at Brooklyn," that is, on the site which had been originally designated, on the water line. Gillies thereupon agrees with the Government that

> "he will in the construction of the said dry dock *change its location to one 64 feet further inland* than that laid down and staked out when the said contract was entered into, and that he will perform all the additional excavation necessary at the entrance of the dry dock in consequence of the said change of location; also all the additional work necessary to lengthen the suction pipes provided to be laid from the present pump-house, including the piping, round piles, sheet piles, timber, iron-work, excavation and back filling, etc., and all other work incident to said *change of location*, supplying all the labor and materials therefor."

This contract further stipulated that the contractor should be paid for this agreement the sum of $5,063.18, and it extended the time for the completion of the dry dock eight weeks on account of the change in position.

It is contended on the part of the demurrant that under the well-established rules relating to sureties these changes in the original contract, to which it is not alleged or pretended that the surety consented, absolved the surety from his liability. The plaintiff in error contends that by virtue of Article VII. of the original contract the surety may still be held, the two supplementary contracts to the contrary notwithstanding. The provisions of Article VII. are as follows (p. 6):

> "*Seventh*—The construction of the said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereto annexed, and shall be deemed and taken as forming a part of this contract, with the like operation and effect as if the same were incorporated herein. No omissions in the plans or specifications of any detail, object or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed and observed by the contractor, and all claims for extra compensation by reason of, or for or on account of such extra performance are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said *plans and specifications* shall *not* be changed in any respect, except upon the written order of the Bureau of Yards and Docks; and that if at any time it shall be found advantageous or necessary to make any change, alteration or modification in the aforesaid plans and specifications, such change, alteration or modification must be agreed upon *in writing* by the parties

to the contract, the agreement to set forth fully the reasons for such change and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof, which the contractor shall receive, if any. Provided, that whenever the said changes or alterations would increase or decrease the cost by a sum exceeding five hundred dollars ($500), the actual cost thereof shall be ascertained, estimated and determined by a board of naval officers to be appointed by the Secretary of the Navy for the purpose, and the contractor shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation he shall be entitled to receive in consequence of such change or changes. Provided further, that if any enlargement or increase of dimensions shall be ordered by the Secretary of the Navy during the construction of said dry dock, that the actual cost thereof shall be ascertained, estimated and determined by a board of naval officers, to be appointed by the Secretary of the Navy, who shall revise said estimate and determine the sum or sums to be paid the contractor for the additional work that may be required under this contract. And provided also, that no further payment shall be made *unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred*, and until after its approval by the party of the second part. And further provided, that no change herein provided for shall in any manner affect the validity of this contract."

In regard to the effect of Article VII. it is contended by the defendant in error:

First—That the provisions of the article relate at

most to changes merely in the plans and specifications of the contract, and that there is nothing in the article which remotely refers to a change in the location of the work as fixed by Article I. of the contract itself. Therefore Article VII. does not in the slightest degree aid the plaintiff in error, so far as our contentions are based upon the change in the location of the dry dock agreed to by the second supplemental contract.

Second—That Article VII. contains no stipulation or agreement by Gillies to assent to such changes in the plans and specifications as the Government might suggest. Whenever Gillies and the Government agreed upon subsequent changes, the same was done by Gillies of his free volition and not in the carrying out of an agreement of Gillies contained in the original contract, and, therefore, not in the carrying out of an agreement which the sureties stood bound to see that Gillies performed. Article VII. was inserted for the purpose of affording a protection to the Government and to the contractor in the nature of a statute of frauds against disputes as to extra compensation.

Third—That if Article VII. is construed to contain an obligation on Gillies' part to agree to such changes as the Government might direct, that very construction of the article requires the Courts to construe strictly the limitations upon the Government in regard to the nature of the changes in the plans and specifications, and therefore requires the Court to say that the Government is precluded from making any such extensive and far-reaching changes as were made.

Fourth—That the supplemental contracts are upon their face not entered into pursuant to the provisions of Article VII., in that they fail to specify various of the matters required to be specified by that article.

POINT I.

A change in the provisions of the contract absolves the surety from liability.

The proposition that a change in a contract, the performance of which is guaranteed by a surety, ordinarily absolves the surety from any liability is so familiar that it is hardly necessary to refer to authorities.

The change may be small in extent.

The change may be "immaterial."

The change may even be deemed "beneficial" to the surety.

Nevertheless, if there be a change the surety is not liable.

As is well stated by the Trial Court (92 F., 299):

> "A surety has a right to stand on the very terms of his contract; and if he does not assent to any variation of it and a variation is made, his liability will be extinguished even though such alteration be for his own benefit."

Equally important is the principle that the liability of a surety cannot be extended by implication, and that the Courts will carefully guard his rights and protect him against a liability not strictly within the expressed terms of his contract.

We desire at the outset to lay special stress upon the favor which Courts have uniformly afforded to sureties in suits brought against them. When a departure has been made from the terms of a contract he who has guaranteed the performance of the original contract cannot be held to a liability. It is not necessary in such a

case to discuss the question of how he is affected or how the principal is affected by the change that has been made in the contract as guaranteed. It is a sufficient answer for him to say "this is not the contract which I guaranteed. I did not enter into this undertaking."

The principle is so well settled that it seems unnecessary to cite authorities; and if it were, the great numbers cited in the learned opinion of the Judge at Circuit would make such a reference unnecessary. Ever since Judge Story delivered the famous opinion in 1824, in *Miller* vs. *Stewart*, 9 Wheaton, 680, his language has been reiterated in opinion after opinion:

> "Nothing can be clearer both upon principle and authority than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation he is bound and no farther. It is not sufficient that he may sustain no injury by a change in the contract or *that it may even be for his benefit.* He has a right to stand upon the very terms of his contract, and if he does not assent to any violation of it and a violation is made, it is fatal, and Courts of equity as well as of law have been in the constant habit of scanning the contracts of sureties with considerable strictness."

In this case a bond had been given for the faithful discharge by a Deputy Collector of Internal Revenue of his duties under a certain appointment for eight townships within the district of the collector. The appointment was subsequently altered by adding another township, and it was held that this extinguished the liability of the surety. "He has a right," says Judge Story, "to stand upon the

terms of his bond which confine his liability to money received under appointment for eight townships."

In *Page* vs. *Krekey*, 137 N. Y., 307, the change in the contract upon which the undertaking was given was merely a change that certain hides should be delivered to a different firm from that named in the primary contract.

Says, O'Brien, *J.*:

> "This question seems to have been disposed of in the court below on the ground that the change was not material; but the answer to that is that the defendant's obligation is *strictissimi juris* and he is discharged by any alteration of the contract to which his guarantee applied, whether material or not, and the Courts will not inquire whether it is or is not to his injury."

In *Smith* vs. *U. S.*, 2 Wall., 234, Mr. Justice Clifford says:

> "The responsibility of a surety rests upon the validity and terms of his contract, but when it is changed without his knowledge or authority it becomes a new contract and is invalid because it is deficient in the *essential element of consent.*"

In *Nat. Mech. Bk.* vs. *Conkling*, 90 N. Y., 116, Earl, *J.*, says:

> "A surety is never to be implicated beyond his specific engagement and his liability is always *strictissimi juris* and must not be extended by construction."

In *Livingston* vs. *Moore*, 15 App. Div., at page 19, it is stated by the Court:

> "It is elementary that *any change* in the terms

of payment named in the contract will discharge the surety."

Citing—

Ducker vs. *Rapp*, 67 N. Y., 464, and *Calver* vs. *Davies*, 73 *id.*, 211.

Says Mr. Justice Daniel:

"As against a surety neither a court of law nor a court of equity will lend its aid to affect him beyond the plain and necessary import of his undertaking. Equity will not as against him assist in completing an imperfect or defective instrument, much less will it add a new term or condition to what he has stipulated. He must be permitted to remain in precisely the situation in which he has placed himself, and it is no justification or excuse with another for attempting to change his situation to allege or show that he would be benefited by such a change. He is said to possess an interest in the *letter* of his contract."

McMicken vs. *Webb*, 6 Howard, 292, at p. 298.

In *United States* vs. *Case*, 25 Internal Revenue Rec., 56 (Northern District of New York), the defendant had guaranteed a contract to furnish stone to the Government in accordance with samples. The contract sued upon was for stone from particular quarries, excluding others specified. It was held that a surety was released from his obligations under a contract guaranteed by him when any modification is made in that contract, even though it be made by mutual agreement between the principals and in a particular not deemed essential by either of them.

In *United States* vs. *Corwine*, 1 Bond, 339 (Sixth Circuit), the principals had bound themselves to the

United States to open a ship canal of certain dimensions and keep it open for a certain number of years from the time of the acceptance of the work by the Secretary of War. The principals did not live up to their agreement and the Government accepted the work with a channel two feet *shallower* than the contract called for. The Court held that the sureties were discharged from all liability.

The Court said:

> "There is no principle better settled than that a surety is not bound beyond the terms of his contract and that his liability cannot be extended or enlarged by implication, and any change in its terms, unless expressly assented to by him, releases him from his legal responsibility. This is familiar law, so long and so well settled that it is not necessary to cite the numerous cases by which it is sustained. * * * This view would seem to be decisive of the question raised on this demurrer, and it is not of material inquiry whether the interference of the Government and its acceptance of the work not executed according to the contract could affect injuriously or otherwise the interests of the sureties. The only ground on which it is claimed that the sureties are liable is that the acceptance of the work in its incomplete state does not place them in any worse condition than if the contract had been strictly complied with and that their liability on their undertaking that the channel should be kept open continues in effect by the act of the Government. The first reply to this assumption is that any change in the terms or obligation of a surety without his consent releases him from liability, and it is well settled that this principle applies even in cases where a modification of the contract is favorable to the sureties."

U. S. vs. *Corwine*, 1 Bond., 343.

Says Danforth, *J.*:

> "The respondent's counsel, however, contends with much earnestness that the alteration made by the creditor and principal debtor is not material, and, therefore, does not injuriously affect the surety. That it changes the contract is very plain, and it does not seem necessary to inquire what mischief the alteration might produce or how it might be prejudicial to the surety. The law requires that if there is any agreement between the principals with reference to a contract to the performance of which another is bound as surety, he ought to be consulted in regard to any proposed alteration, and if he is not or does not consent to the alteration, he will be no longer bound, and the Court will not inquire whether it is or not to his injury."

Paine vs. *Jones*, 76 N. Y., 274, at p. 278.

Under the well established rules laid down in the above authorities and for which innumerable other authorities might be cited, it is clear that the changes made by either of the two supplemental contracts of 1893 were sufficient to defeat any liability of the surety, unless the surety expressly guaranteed the contract as changed. They were changes of great magnitude, involving great additional labor, as is shown by the fact that they called for over $50,000 of additional compensation. The first change made the dock one-ninth as large again as it had been. The change made by the second of the supplemental contracts was even more extraordinary. The contract had provided that the dock was to be built on the water-line, and the location had been fixed there. Nine months later, and therefore when the work was considerably advanced, the location was changed and fixed at an inland point. Obviously, unless some facts can be shown which take this

case out of the application of the general rule, the changes in the contract were such as would entirely do away with the liability of the sureties.

POINT II.

The provisions of Article VII. do not take the case out of the general rule governing the liability of the surety.

The only question that arises here is whether the provisions of Article VII. of the original contract take both the changes made by the supplemental contracts out of the ordinary rule of law, so that the surety can be held notwithstanding them.

The statement is loosely made that Article VII. was inserted in the contract "in contemplation of changes." In a certain sense the possibility of changes in the minor details of a structure is a matter "contemplated" by the parties to every contract. In the contract at bar this contemplation took some formal shape under provisions prescribing the conditions which should be necessary to enable the contractor to obtain extra compensation, namely, that the change "must be agreed upon in writing by the parties," "the agreement to set forth fully the reasons for such change," and the "increased or diminished compensation," and that the question of compensation should be referred to a board of naval officers.

The provisions which thus prescribe the formalities by which changes and the compensation therefor should be agreed upon and determined between the parties, if the contractor desired extra compensation, do not constitute any agreement on the part of the surety that he shall be

bound by any and all changes the contractor sees fit to make, or that the Government shall be absolved from the simple duty of obtaining the consent of the surety to such changes.

The condition of the bond is stated in the complaint. It was for the "performance of the *stipulations* of the contract of even date herewith." The surety was not a party to that contract in any proper sense. He bound himself by *another* contract to be responsible for the carrying out of whatever Gillies by his contract had bound himself to do. If Gillies bound himself by that contract to build a dock in accordance with whatever variations from the original plans and specifications the Government might require, then should the Government require such variations and should Gillies fail to do the work as so changed, the surety would be bound. We contend that the language of Article VII. did not impose upon Gillies the obligation of building the dock in accordance with whatever variations or changes from the plans and specifications the Government might require. We contend that he acted as a voluntary agent in agreeing to the changes that were made, and that the consent of the surety to his new liability should have been obtained in order to hold him.

On a careful examination of Article VII. it will be found that there is not, from the beginning to the end, any express agreement on the part of the contractor that he will without further promise alter the plans and specifications in any respect that the Government requires, nor is there any reservation to the Government of the right to require such changes. This clause was clearly inserted to prevent fanciful claims on the part of the contractor for extra compensation, such as had been put forward by other contractors, and notably by dry-dock contractors under similar circumstances.

The article starts out with the statement that the construction of the dry dock shall in all respects conform to the original plans and specifications, *which are annexed to the contract.* It then provides that any small omission in either plans or specifications of items necessary to the performance of the contract shall not operate to the disadvantage of the Government, and that no extra compensation shall be allowed to the contractor therefor. Coming to the question of changes and of *new agreements* in respect thereto, there are several provisions to govern the form of such agreements. They are contained in this significant language:

> "And that if at any time it shall be found advantageous or necessary to make any change, alteration or modification in the aforesaid plans and specifications, such change, alteration or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof, which the contractor shall receive, if any."

It would seem that words could not more clearly state that the proposed changes must be the subject of agreement between the parties; that in making them, each performs a voluntary act and makes a voluntary promise. This is not the language that would be used if one of the parties, namely, the contractor, was intending to agree beforehand that he would make any changes which the other party, namely, the owner, might require. It negatives the idea of any existing obligation to make any and all changes that the Government might require, and of an entire surrender of independent volition in this respect on the part of the contractor.

Further provisions show that the agreement must "set forth fully the reasons for such change," and the nature thereof; it must state the exact sum which the contractor is to receive; the amount, if it exceeds $500, is not to be determined by the Bureau, but by board of naval officers, after investigation. Enlargements of dimensions must be upon the authority of the Secretary of the Navy himself in order to be effectual. Finally, "no further payment shall be made unless such *supplemental or modified agreement* shall have been signed before the obligation arising from such change or modification was incurred."

As was stated by the Trial Court (p. 92, F. 299), "a characteristic feature of this article is the Statute of Fraud which it embodies. Its salient and essential purpose was to guard the Government from claims for extra work. This appears repeatedly as the section progresses."

There is no doubt that the provisions are intended to put a veto upon any general claims for extra compensation on the part of the contractor. But nothing there can be spelled out to contain an agreement on the part of the contractor without further promise to conform to anything and everything that the Government might desire. In fact, the requirement that the change "must be agreed upon in writing by the parties to the contract" completely contradicts any such idea.

For this reason the provision also serves as a protection to the contractor. It excludes any idea that the Government can order alterations at will. Alterations must be the subject of an agreement between both parties. The agreement must be in writing. The reasons for the alterations must be stated in the agreement. Even the Bureau making the contract is not empowered to act of itself in all cases where it makes a new agreement with the contractor. It cannot agree to

an enlargement of dimensions without an order from the Secretary of the Navy. It cannot agree to the cost of changes without the determination of a board.

Finally, the modified agreement must have been signed before the obligation arising " from such change or modification " was incurred.

It may be said of these provisions that they are in part for the protection of the Government against the contractor, in part for the protection of the contractor against the Government, and in part for the protection of the Government against its own officers. But whatever they are, they leave the contractor a free agent in the making of his agreement.

The plaintiff in error deduced in the Court below the following conclusion from cases cited:

> " We deem it established by the foregoing authorities that where the original contract reserves to the owner the *right* to make changes and alterations without any limit, the sureties on the bond given for the faithful fulfilment of that contract by the contractor are not released by showing that changes and alterations have been made pursuant to the contract."

If the phrase " where the original contract reserves to the owner the *right* to make changes and alterations without any limit " means " where the original contract imposes on the contractor the *obligation* without limit to make such changes and alterations as may be prescribed by the owner," we presume that nobody will dispute the proposition. In point of fact, such changes are not deviations from the original contract; they are a part of it.

The cases bear out the contention only if intended in that sense.

Wehr vs. *The German Lutheran Church* (47 Md., 177) cited by the plaintiff in error on page 15 of his brief as "the case most similar to the one at bar" is, in fact, diametrically opposite in this crucial point. In that case, the provision of the contract bearing the alleged resemblance to the present Article Seventh, was this:

> "Should the building committee appointed by said congregation desire to make any changes from the drawings and specifications at any time during the progress of the work, *the same shall be carried out* by the said Seigman & Jones (the contractors) without making void or in any manner affecting this contract."

The words, "the same shall be carried out," imposed upon the contractor a compulsion to make "any changes" which "the Building Committee appointed by said congregation desire." The plaintiff in error cannot read into Article Seventh any such meaning as is contained in the words of the contract in the Wehr case. There are no similar words in Article Seventh, and it is impossible to distort the language of Article Seventh into the conveying of any such meaning, or the imposing of any such compulsion upon the contractor. For this reason the Wehr case not only does not aid the contention of the plaintiff in error, but is directly in point in support of the surety's contention here, to wit: that in no case does the surety's liability survive alterations in the original contract to which he did not assent, unless a *positive compulsion* to make the changes, or impose upon the contractor by the terms of the original contract. If, by the terms of the original contract such a duty is imposed, as in the Wehr case, and in the case next cited by the plaintiff in error, The Village of Chester *vs.* Leonard, 68 Conn., 495, a different question is raised, and one which it is not necessary here to discuss. The limitations of this proposition

are fixed by the language of the contract here before the Court, and not by the language of other contracts.

In the *Village of Chester* vs. *Leonard*, 68 Connecticut, 495, the Court said of the provisions of the contract:

> "The quantities of work to be done as specified were approximate only and could be increased or diminished by the Board of Water Commissioners, and (the contract provided) that the engineer should have power to make such changes in the form, dimensions and alignment of the work as may, in the opinion of the engineer and Water Works Commissioner, be necessary for the proper fulfilment of the work."

Here again there was a power to make the changes expressly reserved in the owner.

It is to be noted, however, that in this case the Court held that the sureties were released because of changes in the method of making the payments.

In *DeMattos* vs. *Jordan*, 15 Washington, 378, at page 380, the Court says:

> "The contract provides that the contractor shall perform any work requiring any alteration, modification or addition which the architect and owner shall demand as the work progresses upon receiving written authority from the architect approved by the owner specifying," etc.

Here again the obligation was upon the contractor to make any changes that were required of him.

In the case of *Northern Light Lodge, No. 1, I. O. O. F.*, vs. *Kennedy*, 73 N. W. Rep., page 524, the contract said:

> "The I. O. O. F. (the owner) shall be at liberty to make such changes or alterations during the con-

struction of the building as they shall consider necessary, and the contract shall not be invalidated by such action, but a proper allowance shall be made in the price of contract at the time of said changes," etc.

Here again the right was reserved to the owner.

It is to be noticed that in this case the contract also provided, in addition to the above requirement, that

> "No alterations shall be made * * * except upon the written order of the architect,"

and the Court held that inasmuch as the alterations had been made pursuant to oral instructions from the owner and not upon a written order by the architect, the sureties were released.

In *Beers* vs. *Wolf & Strimple,* 22 S. W. Rep., 620, the contract contained the following clause:

> "The superintendent shall be at liberty to make any deviation from, or alteration in the plan, form, construction, detail and execution described in the drawings and specifications without invalidating or rendering void this contract."

Here also changes are compulsory.

In *Risse* vs. *Planing Mill,* 40th Pac. Rep., 904, as stated by the Court, page 905:

> "The owner had reserved the right to make changes which was expressly provided for in the contract."

In *Hayden* vs. *Cook,* 12 N. W. Rep., 165, the provision was a similar one, page 167, that—

> "Should the said party of the second part at any time during the progress of the said works require any alteration or deviations from additions to or

omissions in the said contract he shall have the right to make such change or changes and the same shall in no way injuriously affect or make void the contract," etc.

In *Smith* vs. *Molleson*, 148 N. Y., 24, the clause is:

"Should the owner at any time during the progress of the said work request any alterations, deviations, additions or omissions from the said contract he shall be at liberty to do so and the same shall in no way affect or make void the contract."

Four other cases are noted in the learned opinion of the Trial Court (p. 92, F. 299, *et seq.*), as follows:

In *Consaul* vs. *Sheldon*, 52 N. W. Rep., 1104, at page 1107, the contract stipulated that—

"Should the proprietor at any time during the progress of the work require any alterations of, deviations from or additions in the said contract, specifications or plans, he shall have the right and power to make such change and changes and the same shall in no way injuriously affect or make void the contract."

In *Howard County* vs. *Baker*, 119 Mo., 393, the contract provided that the County Court, through the architects, might make any alteration desired in the specifications and should have the right and power to make any such change or changes and that the same should in no way injuriously affect or make void the contract.

In *Ashenbroedel Club* vs. *Finley*, 53 Mo. App. Reports, 256, the contract provided (at p. 258):

"The architect and superintendent shall be at liberty to make any deviation in the plan, form, construction, detail and execution prescribed by the specifications without invalidating or rendering void this contract."

In *Western Building Association* vs. *Fitzmaurice*, 7 Mo. App. Reports, 283 (at p. 285), the contract provided:

> "If the party of the second part or the architect shall find it necessary to make any changes or alterations from the original design or in the mode of work, such change or alteration shall be made by the parties of the first part and shall in no wise vitiate or annul this agreement."

It appears that in every one of these cases the voluntary action of the contractor was taken away, that he was no longer a free agent, that he was bound by the contract to make such changes as the owner or owner's agent might direct.

No such compulsory obligation on the part of the contractor is to be found in Article VII. of the contract at bar. The article carefully avoids the statement so frequently used in contracts as almost to be conventional, "the parties of the second part shall be at liberty (or shall have the right) to make such alterations, modifications or changes as it may deem necessary."

There is not a word in the article to indicate a reservation of such a power in the Government, and an indefinite agreement on the part of the contractor. On the contrary, there is a plain statement that

> "If at any time it shall be found advantageous or necessary to make any change, alteration or modification in the aforesaid plans and specifications, such change, alterations or modifications *must be agreed upon* in writing by the parties to the contract, the agreement to set forth fully the reasons for such change and the nature thereof and the increased or diminished compensation based upon the estimated actual cost thereof which the contractor shall receive."

No case has been cited, and we believe none can be found, which holds the surety under a provision in reference to changes, except in cases where such changes are clearly made compulsory upon the contractor by the terms of the original contract.

The learned Trial Judge in his opinion (92 F., 299) gives "a survey of the applicable law" "by summarizing the holdings," in other words, a survey of the principles which are laid down in the reported cases. One of these principles which he suggests as drawn from the cases is that it is immaterial that the primary contract does not make the execution of the changes obligatory on the contractor, provided it empowered him to make a subsidiary contract for the performance thereof or contemplated that he may make voluntary such contract, and he cites as authority for this two of the cases cited above, namely:

> *Northern Light Lodge, I. O. O. F.,* vs. *Kennedy* (North Dakota), 73 N. W. Rep., 524.
>
> *Beers* vs. *Wolf & Strimples,* 116 Mo., 179, and also 22 S. W. Rep., 620.

We submit that the most careful examination of these cases fails to give even a suggestion of any such principle.

In the Northern Light Lodge case, as already noted, the provision was:

> "The I. O. O. F. shall be at liberty to make such changes or alterations during the construction of the building as they shall consider necessary and the contract shall not be violated by such acts, but a proper allowance shall be made in the price of contract at the time of such changes, either to the I. O. O. F. or the contractors, as the case may be."

Here the primary contract made the execution of the changes obligatory upon the contractor. The case starts

with this proposition, nor is there a suggestion even *obiter*, that the surety would be bound if the execution of the changes was not obligatory upon the contractor. The Court says (p. 525):

> "It is clear that the contract expressly declares that the plaintiff may make such alterations or changes as it may deem necessary."

And again:

> "The plaintiff had the right to make such changes or alterations as it may desire."

The Court held that the surety was released because the contract required the order to be in writing and the order in fact was verbal.

In the second case, that of *Beers* vs. *Wolf & Strimple*, absolute power was given to the agent of the owner. The words were:

> "The superintendent shall be at liberty to make any deviation from or alteration in the plan, form, construction, detail and execution described by the drawings and specifications," etc.

It was, however, provided that the parties to the contract which, as it happened, included the sureties, must sign the new agreement. This had not been done, and the surety was therefore released.

There is not in these cases, nor in any other case that we have been able to find after a long search, any decision holding that a mere provision contemplating changes will be sufficient to preserve the liability of the sureties, without their express consent.

Our argument at this point has proceeded to this extent, which we here summarize:

First—The contractor did not stipulate and bind himself under Article VII. to make the changes required.

Second—No authority can be cited holding that in the absence of such a stipulation the surety remains liable simply because it appears by the original contract that "changes were contemplated."

The question is, therefore, open for discussion upon a basis of logical analysis.

The argument against us is that, inasmuch as Article VII. mentioned the contingency of changes and then added "that no change herein provided for shall in any manner affect the validity of this contract," it is apparent that the surety "contemplated" changes and "contemplated" a survival of his liability in spite of them. The answer suggesting itself at once is that "contemplation" is a question of intention and that intention would be only of importance in a matter of this nature in case there were any ambiguity in the express terms of the surety's agreement. There is no such ambiguity. There is in contracts of suretyship no foundation for a liability upon a contract merely *implied* by law. The foundation for this surety's liability is only upon his express agreement. What comes within the language of that express agreement is definite and certain, and the fact "that the possibility of changes was contemplated" is entirely immaterial.

The question was asked at the trial by the learned Trial Judge:

> "Would it be consonant with the intention of the parties including the sureties to read into the seventh article a provision that the making of an auxiliary contract without the consent of the sureties could release them?"

The plain answer to this question is that the *law* reads it in unless the sureties by express agreement read it out. Is it ever within the intention of the owner making the contract, whose performance is guaranteed by a surety, that the surety shall be released by change in the contract? When the owner makes a contract, takes a bond for its faithful performance, and subsequently by an agreement with the contractor makes a change, could anybody suppose that it was within the owner's intention that the surety should be released by that change, or that when the owner made the original contract he intended in making it that an eventual change which he might deem desirable could release the surety?

This is a rule of law, not a question of the intention of the parties, and it is only by reason of an ignorance of the law or a heedlessness in properly protecting himself that the owner ever makes a change in a contract without obtaining the consent of the surety. The fact, however, that his failure to obtain such consent is due to ignorance or to heedlessness does not help him to maintain the liability of the surety even in the case of the Government. In fact, least of all, it might be said in the case of a Governmental department, which has at its command the highest legal ability, which fills its contract with provisions to safeguard the interests of the Government and which substantially is enabled to dictate to contractors and their sureties its own terms in the making of such safeguards. As we shall presently show, this very provision of Article VII., or one identical with it in terms, has received an official interpretation at the hands of the highest law officer of the United States, and the very department of the Government which made this contract had been carefully warned that in case of such a provision for changes and a change made thereunder, it was necessary to obtain the consent of

the sureties; but that warning passed unheeded and the attempt is now made to do exactly that which the law forbids, namely, to charge the surety with liability upon a changed contract by employing or reading into the contract some inferential consent on the part of the surety.

We again call attention to the fact that the surety was not a *party* to Gillies' contract. This is not one of the numerous classes of cases in which the surety signs the original contract itself. The terms of the original contract were not incorporated in the bond. The agreement between the surety and the Government was that Gillies should do whatever he had agreed to do by that original contract. We do not advance the argument at all by saying that in the original contract there was an agreement that changes should not defeat the validity of the original contract. Such a change might very well not defeat the validity of the original contract and yet defeat the liability of one who was not a party to that contract, but who had agreed to see that *that* contract was carried out if the Government desired it to be carried out. There is no ambiguity in the phrase. There is no room for construction, either in favor of or against the surety. If the surety had been a party to the original contract, and had expressly agreed that where Gillies and the Government agreed to a supplemental contract his liability should survive, there would, of course, be no question. But there can be no holding of a surety upon an implied contract. The question is, what has he stated in the bond which he has signed?

As a matter of fact, this clause in reference to the validity of the contract has nothing whatever to do with the question of suretyship. It was obviously inserted so as to give the Government the same right of forfeiture, etc., against Gillies in case of any change in the contract that it had by the original contract. Had it not been for this

clause at the end of Article VII. there might have been some question of the Government's right to forfeit the changed contract pursuant to Article XI. Other reasons can be suggested why such a clause was inserted, but all of them relate exclusively to the contract relations between Gillies and the Government. If the surety was to be bound by any such agreement, it should have been in the sureties' contract or at least have had direct reference to that contract or the obligations it imposed.

Indeed, we have never been able fully to comprehend this branch of our opponent's argument. Changes in a contract are always contemplated in a general sense. The fact that the contractor precludes himself from insisting upon any claim for compensation unless the change shall be agreed upon in writing, does not make changes any more contemplated or any less contemplated than had there been no such provisions. And suppose that the changes were contemplated and were expected in view of the nature of this enterprise, the surety had every reason to expect that as they were subject to agreement on the part of the contractor much more should they be subject to agreement on the part of the surety.

And finally if we are wrong in this and must consider what the surety "contemplated," what then?

The sureties considered, and had a right to consider, and apart from the express agreement must be presumed by the law to have considered, that wherever any change was determined on, their consent would be obtained to it. It is an extraordinary obligation for anyone to assume to guarantee a contract with a provision for indefinite changes. A surety ordinarily gives his guarantee for a specific contract. He studies the contract carefully, the amount of the liability it imposes on the contractor, the contractor's ability to meet it, and all the other elements

of risk involved. He does it on the theory and understanding that his risk has a definite limit disclosed by the features of the contract and the circumstances surrounding it, and this limit to the risk is entirely apart from the limit of the bond. To guarantee a contract subject to indefinite change at the will of others, that is to say, at the will of the parties to the contract, is a guarantee which few prudent men would give, a guarantee of so improvident a character that a court of equity might well be justified in refusing to enforce it. Such a guarantee certainly will not be enforced unless it is expressly shown to be the intention of the parties. It cannot be based upon a mere assumption, or implication. On the contrary, the presumption is clearly that the surety intended that his consent should be obtained to all changes, upon which the parties might agree.

The fact that the primary contract says that, as between the pricipals, any agreement for change, in order to bind them, must be in writing and is surrounded by other formalities and conditions they choose to adopt, and that such a change so agreed upon will not invalidate *their* contract, in so far as their new agreements leave it unchanged, does not give the surety reason to reflect that a new bond from him was not to be asked in case of any such change. All that the surety had before him was what the contract says, namely, that if the principals should make changes, they shall, in order to constitute a ground for compensation, be evidenced by certain instruments for the mutual protection of the two principals, and that the remaining obligations of the two principals shall not thereby be invalidated. There is nothing here to lay upon the sureties an obligation to consent beforehand to such changes, or to imply that such a consent has been already given.

POINT III.

Even if Article VII. be construed so as to bind the contractor to accept changes required by the Government, nevertheless the changes intended under such construction were not of the nature which the new contracts effected.

The changes made by the first supplemental contract of June 16, 1893, was to make a dock a ninth again as long and a ninth again as expensive. It was a dock of an entirely different nature from that proposed by the plans and specifications of the original contract. The value of the change at cost price was over $45,000. Assuming, for the sake of argument, as this point assumes —although in general it is denied—that the contractor is obligated by the contract to make changes in dimensions and that the surety has agreed beforehand that his liability shall survive the change in dimensions which may be required, by the Government, of the contractor, the word "dimensions" must receive a strict construction and should not be so construed as to permit the Government, under a clause relative to the change in dimensions, to impose upon a contractor or upon a surety a requirement of building an entirely different dock. The dock built under the added 70 feet became wholly experimental, the largest dry dock in this country, the largest timber dock ever built in the world. It had to fulfill different requirements and encounter different perils. Certainly no one would repeat the experiment of building such a larg dock, except of stone. The so-called "change in dimensions" altered the entire application and character of the work.

Equally extensive and important was the change effected by the second supplemental contract, that of

August 17, 1893, in the location of the dry dock. At the time the supplemental contract was made the work was in progress. The possession and occupancy of the site had been delivered over to the contractor, and the dry dock was then actually in process of construction. It became necessary to move the dock 64 feet inland and to construct an extensive approach to it, all of which was a change in the original contract. We shall have occasion to speak further about the details when we come to the particular consideration of the change of location. Here it is enough to say that it was not a kind of change which could, by any possibility, be implied or presumed as having been consented to by the surety under the provisions in the contract which required changes in the plans and specifications to be made in writing.

The learned Trial Judge in his opinion (92 F., 299, at 305) conceded that however broad the language providing for changes might be, a limit must be put upon it, and he presents instances of what would be considered too extensive changes. Thus, he says:

> "Could the dry dock have been doubled in length? If the contract were for a two-story house, could it have been increased to twenty stories? If it were agreed that the material should be of wood, could marble have been substituted? Obviously such excessive changes would not be within the thought or understanding of the parties or the sureties."

He goes on to say:

> "But a rule of interpretation, otherwise suitable, cannot be obviated by showing the uncertainty of its limited application. All rules operate within reasonable limits, and the Court regards their legitimate use and not their abuse. Where a building contract contemplates changes in the work which

will bind the sureties for the fulfillment of the contract as modified, the changes subsequently made must bear in extent and value some reasonable ratio to the original structure. If the plans and specifications call for a house of particular dimensions and quality, the consent to changes anticipated in the contract should be considered to be limited to changes relevant to and consistent with the structure first projected."

He then concludes that the first change in question, being a change from 600 feet to 670 feet in length, falls within the rule thus stated. That the change is relevant to the structure first projected will undoubtedly be admitted, and, in a sense, that it is consistent with it. The same might be said of a change doubling the size of the dock, which the Court regarded as manifestly not within the anticipation of the parties. But it is difficult to see what principle would apply to an increase of 70 feet that would not apply to doubling the dock. The Court's whole reasoning is directed to the suggestion that, as a dry dock is a large structure, a large addition to the structure may be permitted under the term "change in dimensions." The Court appears to hold that if the needs of the Government might demand a dry dock of the large size stated, then the phrase "change in dimensions" would cover it.

It is submitted that the possible wants of the owner cannot be taken as a measure of the surety's liability for changes. The question is whether, when a surety guarantees a contract for a given structure with full and elaborate plans and specifications, assuming that he has agreed that his liability shall continue, although changes are made in dimensions, he can be held to have intended to mean that he would guarantee the contract under a change of such extraordinary magnitude. To illustrate

the point the Court cited several cases (92 F, at 306), of "judicial expositions of the allowable departure from original plans and specifications when some change of plans was contemplated by the original building contract."

We will briefly examine these cases.

Risse vs. *Hopkins Planing Company* (Kansas), 40 Pac. Rep., 904. The contract here was for a house. The changes are thus characterized in the opinion (p. 905):

> "The departures from the original plans and specifications were not very important, nor were the alterations expensive. The location of a window was changed. Two of the rooms that were to have been separated by a partition wall were connected by an opening or archway. One of the rooms was sealed with lumber instead of being plastered. An inexpensive ventilator was put in the roof and some other minor changes not particularly mentioned in the specifications were made."

This was all. In this, and as in all the other cases cited, the contract expressly reserved to the owner the right to make changes in general.

In *Consaul* vs. *Sheldon* (Neb.), 52 Northwest, 1104, the opinion does not show the exact character of the changes, but it states as a rule (p. 1107).

> "*The changes and additions must be reasonable and not materially increase the cost of the buildings beyond the original contract price.* The evidence shows that the alterations were not unreasonable and that the additional labor and materials *did not greatly exceed the value* of the work called for by the original contract, which was omitted."

Certainly if such a principle as this were to be applied in the present case, it would put the changes in the dry

dock outside of any contemplated by the original contract, and it embodies a principle far more reasonable than that laid down by the Circuit Court.

In *Howard County* vs. *Baker,* 119 Mo., 397, the contract was for building a court-house for $32,000. In this contract the only change made was a change of the window lintels from stone to railroad iron at a cost of one dollar for each window lintel so changed (pp. 403–4).

In *Ashenbroedel Club* vs. *Finlay,* 53 Mo. App., 256, the contract was for the rebuilding and remodeling of the building. The change (p. 260) consisted in sinking some part of the foundations two or three feet deeper than was shown on the original plan.

In *Wehr* vs. *German Lutheran Church,* 47 Md., 177, the contract was for the construction of a church to cost $35,000, and it was enlarged at a cost of $900 by 3½ feet and a stone foundation was substituted for a brick and pile foundation.

In *Western Building Association* vs. *Fitzmaurice,* 7 Mo. App., 283, the contract was for the construction of three brick buildings, and the changes consisted in the substitution of certain door frames of different form and weight and cost, and changing the finish under certain windows from stools and aprons to paneling, as called for (p. 288). The changes made did not reach the sum of $250 (p. 294).

In *Village of Chester* vs. *Leonard,* 68 Conn., 495, the contract was one of those municipal contracts in which nothing is fixed by the specification, but (p. 507):

> "The quantities of work to be done as specified were approximate only and could be increased or diminished by the Board of Water Commissioners, and the engineer could make such changes in the

> forms, dimensions and alignment of the work as might, in his opinion and that of the Board of Water Commissioners, be necessary for its proper fulfilment."

Under these conditions certain changes in the position of the pipe lines were made. It does not appear that these involved a considerable expense, although there is no statement as to the amount which was involved in the changes, and the case was decided in favor of the defendant surety on the ground that changes had been made in the time and manner of payment fixed by the original contract.

In *Northern Light Lodge, I. O. O. F.*, vs. *Kennedy* (North Dakota), 73 N. W. Rep., 524, the contract was for the erection of a building and the changes increased the cost $1,000. The question whether these changes fell within the provisions of the contract was a question which the Court had no occasion to consider, as it held the security released, because the changes were not provided for by written orders of the architect, as required by the contract.

In *Hayden* vs. *Cook*, 34 Neb., 670, the Court said (p. 676):

> "Some changes and additions in the building were made which increased the cost thereof, although not to a considerable extent. Still other changes were made without additional expense."

The above are all the cases cited by the Court. We refer to a few others, as follows:

In *de Mattos* vs. *Jordan*, 15 Washington, 378, the contract was for a brick and stone building costing $23,000 (p. 380). Changes were made in construction of the piers from brick to stone at an increased cost of $335 (p. 383). Changes were also made in the height of the ceil-

ings and in the material of the mantels, but everything appears to have been of this minor character.

In *Beers* vs. *Wolf & Strimple,* 116 Mo., 179, the contract was for the construction of a hotel for $31,000. The case was decided against the plaintiff on account of the failure of certain parties to the contract to sign the agreement for the alterations. The changes consisted of a change of six inches in the depth of the basement and in the depth of the closets, the cost of a bulkhead in the basement and the rearrangement of the closets on the second floor. The only cost referred to is a charge for plastering of $221.

In *McLennan* vs. *Wellington,* 30 Pac. (Kansas), p. 183:

> "A change was made in the plan of the building by moving the wall out two inches, and the specifications were changed by substituting walnut, cherry and poplar instead of pine in certain portions of the building."

We have now referred to every case mentioned by the Trial Court or known to us where changes have been made in a contract in pursuance of a provision looking to changes, and where this provision has been regarded as preserving the liability of the sureties, even though several of the cases were decided favorably to the sureties upon other grounds. In no one of these cases was the change involved anything more than a most trivial modification of the specifications. No case, so far as we know, has ever been decided by any Court which held that a modification involving an additional liability of $50,000, or anything like it, was included within the terms of such a stipulation. If the Court here decides that the provision for changes in the contract binds the surety to such vast requirements made entirely at the will of other parties, as are here pre-

sented, it will be the enunciation of an entirely new principle of law in reference to the liability of sureties.

In connection with this fact it must be remembered that every one of the cases cited stated that the contractor was required to make "any alterations or deviations" which the owner might impose. As we have already pointed out, the present contract does nothing of the sort. In the first place, it does not suggest any compulsory obligation on the part of the contractor or any limitation on his power as a voluntary agent. It merely says that changes which are made must be agreed upon in writing. Secondly, every one of the cases mentioned uses words which affirmatively and expressly include *all* changes, no matter how great, and expressly subjected the contractor to the obligation of making "all changes," without limit. There is no such comprehensive phrase in the contract at bar. In fact, there is no phrase that indicates affirmatively that the changes are without limit. The absence of a limit is something which is attempted to be read into the contract and which it does not contain.

POINT IV.

As Article VII. refers solely to changes in "plans and specifications," it has no bearing on the fundamental provisions of the primary contract, and therefore cannot apply to the change of location under the supplemental contract of August 17, 1893.

We again call attention to Article I. of the original contract, containing the general and primary designation of the structure for which this contract is made. This is the

fundamental provision of the contract, its kernel, that around which all the rest of it is a mere matter of detail. It is as follows:

> "*First*—The contractor will * * * construct and complete, ready to receive vessels, a timber dry dock to be located at such place *on the water-line* of the Navy Yard, Brooklyn, New York, as shall be designated by the party of the second part."

The supplemental agreement of August 17, 1893, undertook to change this fundamental provision of the contract by providing for a new location different from that described in Article I.

We ask the Court again to examine the phraseology of this agreement:

> "Whereas, it has been deemed desirable to change the location of the dry dock * * * this agreement witnesseth: * * * that the party of the first part * * * will, in the construction of the said dry dock, change its location to one 64 feet further inland."

The fundamental provision of the contract required that the dock should be located at the water-line. The dock built under this new agreement is not to be located on the water-line. It is a dock to be located 64 feet inland, with appropriate approaches. Nothing is to be found in the contract which permits a departure from this fundamental requirement that the dock shall be on the water-line, or which alludes to or includes or contemplates or refers in the remotest way to such a change of location.

Innumerable cases may be cited on the general question of the release of the surety by the changes in the contract. Thirty such cases are cited in the opinion of the learned Judge at Circuit and we have cited a number in Point I.

One of these, however, is especially pertinent at this point. In *United States* vs. *Boecker,* 21 Wall., 652, the sureties on a distiller's bond defended the suit on the ground that the bond had recited that the distillery was on one street corner, whereas the distillery was located on another corner, four blocks away, in the same town. The distiller had no other distillery than the one in suit. The Court said:

> "We think this term of the bond is of the essence of the contract. It is hardly less so than the amount of the penalty. One defines the place where the liabilities must arise, the other the maximum of that liability for which the sureties stipulated to be bound. The former can no more be held immaterial than the latter. No distillery having been carried on at the place named, the contract never took effect. The event to which it referred did not occur. There could consequently be no liability within the letter or meaning of the contract."
>
> *U. S.* vs. *Boecker,* 21 Wall., 652.

Whatever interpretation may be put upon Article VII., it is a provision which only affects changes in "plans and specifications." These "plans and specifications" are annexed to the contract and stated to be so annexed in the opening sentence of this very Article VII.

> "The construction of the said dry dock * * * shall conform in all respects to and with the *plans and specifications* aforesaid, which *plans and specifications* are hereto annexed," etc.

It is to these "plans and specifications"—and to them alone—that the possible changes in Article VII. refer. The language of the article is:

> "No omission in the *plans and specifications* of any detail," etc.

"Said *plans and specifications* shall not be changed in any respects except," etc.

"If, at any time, it shall be found advantageous or necessary to make any change, alteration or modification in the aforesaid *plans and specifications*," etc.

It is to nothing but to the "plans and specifications" that the question of changes, as it arises in Article VII., is in any way applicable.

Mention is made in the second proviso of Article VII. of "an enlargement or increase of dimensions"; but the "increase of dimensions" is only referred to as being one form of a change in "plans and specifications," which is to be treated as to the ascertainment of compensation in a specific way.

Article VII., therefore, does not suggest or refer in any way to a change in the contract itself; that is to say, the instrument to which the "plans and specifications" are annexed, and when it refers to the "plans and specifications," it refers to something distinguishable and distinct from that instrument. Nor is it any answer to say that the contract provides that "they (the specifications) shall be deemed and taken as forming a part of this contract with the like operation and effect as if the same were incorporated herein." This may make the "plans and specifications" a part of the contract in the sense that the contractual obligation extends to them, but it cannot make the contract a part of the "plans and specifications" in such a manner that provisions relating exclusively to such "plans and specifications" shall be held to relate to the fundamental provisions of the contract itself.

Assuming for the sake of argument—although we deny it—that Article VII., in terms, provided that the con-

tractor was compelled to agree to any change in "plans and specifications" that the Government might require and that the sureties should be bound by any such changes in "plans and specifications" that the parties might agree upon, the article would, nevertheless, be inapplicable to the terms of the contract itself as distinguished from the "plans and specifications," and with good reason. Whatever agreement two parties to a contract for construction work may make with the view of giving flexibility to the work, and providing for minor changes, and whatever agreement the sureties upon such a contract may accept as to their continued liability in the face of changes, there must still be some point at which the provisions of the contract are fixed and absolute. It is said with truth that changes are frequently required in the "plans and specifications" of constructive work, especially when such "plans and specifications" are not fully or carefully thought out at the beginning. It is even contended in the present case that where a provision is made in a contract for changes in "plans and specifications," such a provision should be held to cover changes of great magnitude; although we deny that any such changes are contemplated by the ordinary and usual expressions reserving to the owner the right to make changes, and much less by such expressions as are to be found in Article VII. But whatever changes are so contemplated, there is in every contract some limited, specific and definite thing which the contractor agrees to do and which the Government contracts to have done, and in reference to which neither party contemplates any change whatever. A contract to build a dry dock cannot be construed into a contract to build something else, whatever right to change the "plans and specifications" may be agreed to beforehand.

This is the case with the contract at bar. Even conceding to Article VII. the interpretation now claimed

for it by counsel for the Government, a point of fixity in the terms of the contract must still be determined. This point is absolutely marked out at least by the fundamental provisions of the contract itself. These provisions are unalterable, whatever may be done with "plans and specifications."

The intitial clause of the contract (Article I.) provides for the construction of a "dry dock." Assuming that Article VII. required the contractor to agree to changes in the "plans and specifications," it could not empower him to change the structure contracted for to anything but a dry dock.

The same elementary clause of the contract designated the structure as a "timber dry dock." No provision for alterations in the "plans and specifications" could have covered a change in this express and fundamental element of the contract so as to hold the sureties, for example, under a supplemental agreement to build a stone dry dock.

The same fundamental provision fixed the location of the timber dry dock. The contractor was to "construct and complete, ready to receive vessels, a timber dry dock to be located at such place *on the water line* of the Navy Yard, Brooklyn, New York, as shall be designated by the party of the second part." No alterations of "plans and specifications" could disturb this location, so far as it is fixed in the contract. The contractor could not be forced under this contract, whatever consent to a change in "plans and specifications" he had given beforehand, to build the dry dock anywhere except on the water line. The party of the second part was to designate the place on the water line, and this was done at the time when the primary contract was entered into; but once designated, the location could not be changed; certainly not to a point 64 feet inland. An agreement to construct a

dry dock elsewhere than on the water line was not an agreement for the performance of this contract. The agreement to change the location by moving the dock 64 feet inland was not a change in "plans and specifications," but was a recission of the contract of November, 1892, upon which the sureties had given their bond. The contract in question has never been carried out, because it has been abrogated by the mutual consent of the parties.

As it has been already said, it can readily be shown—and it is in fact shown by the contract of August 17, 1893 (Exhibit C)—that this change of location to a location 64 feet inland was a most material change. It was a change requiring new approaches of that length to be built. It was necessary to extend the channel of the Wallabout by that space into the land, making it of sufficient width for the purpose. The channel must obviously be in the neighborhood of 28 feet deep at low water and the banks must be so protected, either by sea-wall or sheet-piling, or other similar work, as to resist the action of the river and tides. The supplemental contract itself says (p. 12):

> "That he will perform all the additional excavation necessary at the entrance of the dry dock in consequence of the said change of location; also all the additional work necessary to lengthen the suction pipes provided to be laid from the present pump house, including the piping around piles, sheet piles, timber, iron-work, excavation and bank filling, etc., and all other work incident to said change of location, supplying all the labor and materials therefor."

It was certainly a very extraordinary contract that the Government induced this contractor to make. The parties seem to have been conscious that they were not mak-

ing a change in "plans and specifications," because their supplemental contract was completely oblivious of "plans and specifications." Here was an immense piece of work, obviously some 64 feet in length by 50 feet in width, in reference to the mode of carrying on which no specification was made whatever, but after a few general provisions, it was stated that the contractor was to do "all other work incident to said change of location, supplying all the labor and materials therefor." What the contractor might be consenting to do under that provision of the contract, or what he might be called upon to do in fulfillment of it, is not easy to say. The form of the supplemental contract showed a complete abandonment of all those safeguards in the way of detailed specifications, which constitute the most important protection of a contractor and of his surety. Even if the contract had not stated in Article I. that the dry dock was to be built on the water-line of the Navy Yard, even if the location had been a mere matter of "plans and specifications," which it is not, as the "plans and specifications" did not mention it, still, it could not be said that any fair interpretation of Article VII. implied that the sureties were to be bound without their consent by such a modification of the contract as this.

Here we come to another point bearing upon the theory that the sureties must be bound by any and all changes agreed upon between the owner and contractor. Article VII. required that any contract for changes should be agreed upon in writing. The new contract was made in writing, but with provisions so loose and vague that no one but a most reckless contractor would have consented to it in that form. The other party might exact almost anything under its broad provisions. It does not attempt to specify as the original contract specified. It cannot be said to contain specifications at all. With this contract

on his hands it is hardly to be wondered at that the contractor defaulted. Had not the surety a right to see this written contract before he was committed to it? Had he not a right to protection even though this foolish contractor neglected to secure protection for himself? Do the language of the contract and bond express any intention on the part of the surety to consent that the contractor should bind himself by any loose and improvident form of agreement that might be suggested to him, especially when it did not relate to any item in the plans and specifications, but constituted a vast amount of new work entirely outside the plans and specifications under such a comprehensive phrase as "all the work incident to said change of location?" If such is to be the construction of the contract as against the surety, it must be founded upon a clear expression of intention in the instrument itself.

The question of the effect and extent of the change, however, is not here of importance. Where a surety has not consented to a change he is released, whether the change is large or small, material or immaterial, whether it inures to the benefit or injury of the contractor. The fact is that, in this case, these sureties only guaranteed a contract to build a timber dry dock *on the water-line* of the Brooklyn Navy Yard, and whether or not they may have agreed to any change with reference to "plans and specifications," and what the nature of that agreement was, or however it must be understood to be limited, they certainly never agreed to any departure from the fundamental terms of the contract itself, to wit, a contract to build a timber dry dock on the water-line of the Navy Yard. The location was fixed on the water-line in the contract itself, and was above and beyond all provisions in the "plans and specifications." It could not be changed without the abrogation of the original contract and the execu-

tion of a new contract. As well might it be contended that the Government might under this contract have applied to the contractor to build a dry dock on Staten Island, or to build a stone dock for a timber dock, or a wet dock like the Erie Basin in place of a dry dock, or no dock at all, but a wharf, or to build two docks in place of one. These are changes in the fundamental contract not in the "plans and specifications." Even on the theory of "contemplated changes," these changes were evidently not contemplated. Neither the Government nor the contractor nor the sureties "contemplated" the construction of anything but a dry dock and a timber dry dock, and a timber dry dock located on the water-line of the Brooklyn Navy Yard. The Government and the contractor can no more hold the sureties after changing their agreement in respect to location than they could have held them after a change from timber to stone as the material of construction, or after a change from a dry dock to some other structure.

Suppose that an ordinary building contract provided that the contractor agreed to build a house on a certain lot. Could it be contended that the sureties were liable under a new agreement made nine months after the work was started between the owner and contractor to build instead on another lot, whatever provision might be made in the original contract for changes in "plans and specifications?"

The plaintiff contended in the Court below that

> "The claim made by the defendant that the provision contained in the second supplemental contract is a change in the contract itself, and therefore not covered by the Seventh paragraph of the contract, is untenable. But the plans and specifications are a part of the contract, and even if there had been

a change in the plans and specifications, it would have been such a change as was authorized by the contract itself."

Assuming that this was true, it does not affect the question, for the change was not a change in the plans and specifications. It was a change in the primary contract, to which the plans and specifications were annexed and of which they were said to form a part; but it does not follow that the contract became a part of the plans and specifications and that the change in the contract was a change in the plans and specifications.

The plaintiff further contended, in view of the provision of the contract that the dock was "to be located at such place on the water-line of the Navy Yard as should be designated by the party of the second part," that the provision would "permit the dry dock to be located anywhere within the entire limits of the Navy Yard, so long as it was accessible to the water"; the idea being that the word "at," as here used, merely means "near to" or "in proximity with" the water, and that to make a dry dock available it must anyway be at or near the water. The learned counsel further said that he considered the changes made by the supplemental agreement were not really changes in the contract or in the "plans and specifications," "but were rather an attempt to render clear some of the points which were not fixed and determined when the contract was drawn." He added, "The location of the dry dock was a matter of uncertainty, for, except that it was built at the Navy Yard, this contract provides that its precise location was to be designated by the party of the second part or the Government. In fact, all that the contract really provides in this regard is that the dry dock shall be constructed so that it will be reasonably accessible to the water. Hence the so-called changes * * * should

be regarded as the only definition" of the terms of the contract, etc., etc.

In his argument below the learned counsel seemed to think that the designation made in this supplemental contract was the first designation of a location that was made by the Secretary of the Navy. In this, as already shown, he was mistaken. The contract of August 17, 1893, is not an agreement to fix the location of the dock, but to change the location. It says (p. 11):

> "Whereas, it has been deemed desirable *to change the location* of the dry dock *now being constructed* at the Navy Yard."

Again, at page 12, the supplemental contract provides that the contractor "will in the construction of the said dry dock, change its location to one 64 feet further inland than that laid down and staked out when the said contract was entered into." It thus appears that, not only had the site been fixed by the Navy Department, but it had been laid down and staked out at the very time when the original contract was entered into in the previous November, and had remained fixed for nine months at that spot, and that the change of location now ordered was not only a change in location from that designated at the date of the contract, but it was also 64 feet inland from the water line, on which alone the Government could designate the site. So vital was this question of site that it appears from Article I. of the contract that the possession and occupancy of the site were to be delivered by the Government to the contractor; that he was to begin work twenty days after such delivery, and that said possession and occupancy were to be secured to him during the period of construction and until completion and delivery of the work; that the work, as stated in the contract of August 17, 1893, was then under construction, and consequently that the

contractor was then, and had been ever since the beginning of the work, in the possession and occupancy of the site, and that this change of location involved his delivering up the possession and occupancy of that site and taking the possession and occupancy of another site 64 feet inland and not on the water line, as the contract required. What is meant by saying that the location of the dry dock was a matter of uncertainty, it is difficult to see. It makes no difference what meaning may be attached to the word "at." Counsel undertakes to say that it means "near" or "in proximity to." The words of the contract are "*at* such place *on* the water line as may be designated by the Secretary of the Navy." It is difficult to believe that the contractor was to be allowed to build the dock anywhere "near" such place or "in proximity to" such place as might be designated on the water line by the Secretary. It is obvious that he was to build the dock not "near" the place designated, but on the lines of the very stakes.

As to the suggestion that any dry dock, to be useful, must be accessible to the water, and therefore, in a certain sense, near the water, we hardly think that it requires an answer. "On the water line" has but one meaning. Ascertain the water line and you ascertain one limitation as to the location at which that dry dock was to be built. The other is simply the position that the Secretary of the Navy may choose on that line. But a dock built on the water line is not a dock built inland with approaches contemporaneously constructed to connect it with the water.

Plaintiff seemed also to contend that there is some indefiniteness about the phrase "on the water line," because of a supposed difference between high and low water mark.

It is difficult to see what indefiniteness is created in the use of the expression "water line" by the differences of high and low water. Whether the water line is high-water mark or low-water mark is immaterial, as the difference between "the water line" and "64 feet further inland from the water line" is equally great whichever mark is taken. As a matter of fact, the sea-wall surrounding the Navy Yard makes high-water mark and low-water mark one and the same water line.

As to the fact that the formation of the land makes part of the Navy Yard an island with a navigable channel around it, and that therefore its water line is a mile in extent—this does not affect the question. If the water line were ten miles in extent or a hundred miles in extent the change from a dock on the water line to a dock 64 feet further inland would be equally great wherever on the water line the original location might have been fixed.

The plaintiff in error attempts, in Point I., to draw an analogy between the case at bar and that of Simpson *vs.* the United States, 31 Ct., Claims Rep., 217, confirmed 172 U. S., p. 372. In that case the contract provided for the construction of a timber dry-dock, "to be located at such place on the water-line of the Navy Yard, Brooklyn, New York, as shall be designated by the party of the second part"; and in the specifications it was provided that the dock should be built "upon an available site to be provided by the Government."

The qualifying clause, which materially extended the discretion of the Government, and gave notice to the surety that his risk was less well defined than in the case at bar, was "upon an available site to be provided by the Government." It was held in the Simpson case that the Government did not guarantee the character of the soil

underlying the site; that the contractors could not recover for extra work caused by the character of the soil underlying the site chosen by the Government on the theory, which it was claimed supported that contention, that the word "available" was a representation by the Government as to the condition of the soil; that the site should be available from the standpoint of the contractors in affording them opportunity to construct the work with the minimum amount of inconvenience.

The counsel for the plaintiff in error then goes outside the record and argues at great length as to the considerations present when a work of this character is undertaken.

All this is beside the question. The question here presented, and the only question, is that the contract provided for the building of a timber dry-dock on the water-line, at some point to be thereafter designated. This fixed the location to that extent: the location must be on the water-line. Any subsequent designation of the exact locality must still be "on the water-line." However, a supplemental contract of August 17, 1893, substituted a new location "64 feet further inland" and awarded the contractor over $5,000 additional compensation for the work. It was a change which cannot be justified as a modification of the plans and specifications within the meaning of Article Seventh, for it provided for an alteration in the location of the structure itself, which location is no part of the plans and specifications, but has its own distinct place in the contract. It has been fully demonstrated in the preceding points that any change, however small, in the terms of a contract, the performance of which is guaranteed by a surety, even though it be for the surety's benefit, releases him, unless he assent to the change. Much more is this true when the changes are of such magnitude and character as those provided for by these supplemental contracts.

POINT V.

Even if the changes in the supplemental contracts were in other respects such as to sustain the liability of the sureties, the supplemental contracts on their face fail to fulfil the requirements of Article Seventh.

The requirements of Article VII. as to the new agreements are plain and specific. The change must be agreed upon in writing by the parties to the contract, and the agreement must "set forth fully the reasons for such change."

Neither of the agreements in question, Exhibits B and C, sets forth anything as to the reasons for the changes therein prescribed.

It has been repeatedly held that specific requirements of this character must be literally complied with. Thus, where the original contract requires the contractor to make any and all changes, and that the change shall be set forth in writing, alterations made pursuant to verbal agreements or directions release the surety.

In the case of *Eldridge* vs. *Fuhr*, 59 Mo. App., 44, the contract said:

> "The owner reserves the right * * * to order through the architect any change in the work without impairing the contract, the value of such changes to be mutually agreed on in writing between the architect and contractor beforehand."

It was also stated that the alterations should be upon the written order of the owner (pp. 47–48). The Court said:

> "By the express terms of the contract the plaintiff reserved the right, by the observation of certain for-

malities, to order changes in the building. If these formalities had been observed it is clear that the original contract would have been in no way changed, and the sureties would have remained bound. But it is undisputed that in ordering the additions the contract was disregarded."

The Court then cites *Beers* vs. *Wolf*, 116 Mo. App., 179, and *Killoren* vs. *Meehan*, 55 Mo. App., 427, in which a similar question was presented, where it was decided that the surety was released. Of the decision in *Beers* vs. *Wolf* the Court said:

"It appeared that various changes had been made in the work, but that in making the changes the conditions of the contract had not been observed, and there was no evidence that the sureties consented to the changes. The Court held that the sureties were released."

As to the *Killoren* case, it thus refers to the decision:

"We decided that if the changes were made under the contract and the conditions had not been complied with the surety could not be held. The foregoing decisions rest on the principle of law, which is universal, that the surety has a right to stand on the strict letter of the contract."

The Court goes on:

"In the case at bar the additions to the work were made solely on the verbal order of the plaintiff. This was in direct violation of the conditions of the very contract for the performance of which the sureties were bound. As the alterations were made without the consent of the sureties, it follows that they are released."

The alterations in question consisted of the addition of two doors, the construction of a skylight and the use of certain cement, of the total value of $52.70 (p. 47).

The provision of Article VII., requiring that the reasons for a change should be fully set forth in writing, cannot be said to be a provision that was adopted solely in the interest of the owner. If it was adopted for the owner's benefit at all, it was only to protect him against the act of his own agents; but it was much more for the protection and security of the contractor. It at least limited changes that might be made to such as were capable of being supported by specific reasons. That being the case, and the requirement of Article VII. being express and indispensable, and this requirement having been disregarded in making the supplemental contracts, and the sureties not having consented to the changes provided for therein, the changes, even though compulsory upon the contractor, were not embodied in contracts fulfilling the required conditions.

POINT VI.

Prior to the execution of this contract the Government adopted and officially promulgated a final interpretation of Article Seventh, or of a similar provision, to the effect that changes made in a contract under such a provision do not bind the sureties.

In 1885 the question was presented by the Secretary of the Navy to the Attorney-General of the United States as to the power of said Secretary to modify the contract for building new cruisers under the Act of August 5, 1882, and the Attorney-General, Honorable Benjamin H. Brew-

ster, replied that, while it was competent for the Secretary to assent to such a modification:

> "I may add here that the assent of the contractor's sureties should be obtained to any change in the contract which affects them before the same is consummated."
>
> 18 Opinions Attorneys-General, 101.

The provisions of the contract referred to were laid down in the Act of August 5, 1882, United States Statutes at Large, 82, chapter 391, page 292, and evidently served as the model upon which Article VII. and similar subsequent provisions were drawn. The similarity of the two provisions is shown by the following extracts:

ARTICLE VII.

> "The said plans and specifications shall not be changed in any respect except upon the written order of the Bureau of Yards and Docks; and that if at any time it shall be found advantageous or necessary to make any change, alteration or modification in the aforesaid plans and specifications, such change, alteration or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof which the contractor shall receive, if any: Provided, That whenever the said changes or alterations would increase or decrease the cost by a sum exceeding five hundred dollars ($500), the actual cost thereof shall be ascertained, estimated and determined by a board of naval officers to be appointed by the Secretary of the Navy for the purpose, and the contractor shall be

bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation he shall be entitled to receive in consequence of such change or changes."

ACT OF AUGUST 5, 1882.

"And after said drawings and specifications have been provided, adopted and approved as aforesaid, and the work has been commenced or a contract made for it, they shall not be changed in any respect, when the cost of such change shall in the construction exceed five hundred dollars, except upon the approval of said board, or a majority of the members thereof, in writing, and upon the written order of the Secretary of the Navy; and, if changes are thus made, the actual cost thereof and the damage caused thereby, shall be ascertained, estimated and determined by said board; and in any contract made pursuant to this act it shall be provided in the terms thereof that the contractor shall be bound by the determination of said board, or a majority thereof, as to the amount of the increased or diminished compensation said contractor shall be entitled to receive, if any, in consequence of such change or changes."

It appears from the above that Mr. Attorney General Brewster in holding that the Secretary of the Navy should obtain the assent of the contractor's sureties to any change before the same is consummated was interpreting provisions precisely similar to those now under consideration. In making the changes of 1893 in the dry dock contract, the Government could and should have endeavored to have obtained this assent. Had the effort been made it might well have been that the Government would not have obtained it from the present surety, as a refusal would have been within his rights. Had it obtained the assent, or

failing that, the substitution of other sureties upon the bond, the question would not now have arisen.

The fact is that the proceedings in respect to these two changes in the dry dock contract were of a very unusual character, and it is hard to understand how the Bureau of Yards and Docks could have omitted in this case to take a simple precaution which is substantially universal in the transaction of Government business, namely, to obtain the consent of the sureties to all changes, even minor changes, or failing that, to obtain the substitution of other sureties upon the bond. It is especially difficult to account for this omission in a case where the changes were of such extraordinary magnitude. It very rarely happens, as the review made above of the reported cases shows, that changes even in plans and specifications of such an extensive character are made as that referred to in the first supplemental contract, and it is almost unheard of that a change should be made in the underlying provision of the contract itself like that which moved the location of the dry dock 64 feet from the water-line. It is inconceivable that such attempts as these to alter the liability of the contractor and of the surety should have been made without any reference to the surety at all, as if he was a party who had no interest whatever in the transaction.

Another instance of the extraordinary looseness with which this business was conducted is the fact that the change of location of all the work that it involved in making the channel in the wall about by which the dry dock was to be approached, with all its accompanying piping, round piles, sheet piling, timber, construction, iron-work and back filling should have been contracted for without any specifications at all and nothing but a mere provision that the contractor should perform all this and the other work "incident to such change of location." The looseness is as remarkable on the part of the contractor as it is

on the part of the Government. There is, of course, however, nothing to prevent a contractor from making contracts in such form if he desires, but such contracts cannot bind a surety unless he consents to them.

POINT VII.

The original construction contract was abrogated by the supplemental contracts, and as the complaint did not allege a new contract of suretyship, guaranteeing the new construction contract, the demurrer was properly sustained.

It is stated in the brief of counsel for the government that

> " the defense relied upon by the defendant in error should have been set up by answer, and not by demurrer. The complaint of the plaintiff recites the original contract and two supplemental contracts, and the bond, charging that the bond is a part of the contract, has as much application to the supplemental contracts as to the original. This was all the plaintiff was required to do in his pleading. The rule of law is that any substantial change made in a contract without the knowledge and consent of the surety will release the surety from his obligation ; but want of knowledge and assent is an affirmative defense to be set up by the defendant and is not required to be traversed by the plaintiff in his declaration in anticipation."

We submit to the court that there is an entire confusion of ideas in this statement in regard to the meaning of the cause of action in this case. The complaint

must set up a contract of suretyship between the plaintiff and the defendant surety. The point is not that the complaint must traverse by anticipation the allegation of non-assent, but that the complaint is bound to state the contract upon which the cause of action is based. If it is a contract of suretyship on the original construction contract, that is one thing. If it is a cause of action on a different construction contract, that is another thing. It must set up the contract on which it relies. In the present case the plaintiff has set up the contract of suretyship conditioned for the fulfillment of the original construction contract. Then it sets up that the original construction contract was abrogated by certain changes and modifications. This, as we claim, is ground for demurrer. No other cause of action is stated but that on the original bond and the original contract, which the pleading likewise states is abrogated. Under those circumstances, the contract pleaded is not the contract upon which the plaintiff intends to sue, and he cannot recover upon any imaginary new contract of suretyship conditioned for the fulfillment of the new contract of construction. He must plead the new contract. If he is to recover on the new contract he must plead it in terms.

The complaint must set up a contract of suretyship between the plaintiff and the defendant. The particular contract of suretyship set up is conditioned for the fulfillment of a construction contract between the plaintiff and the contractor to build a certain dry dock. It was necessary, of course, to plead the contract of suretyship, and it was necessary to plead the construction contract which the contract of suretyship was alleged to guarantee. Had there been no question of a change, the plaintiff could, by alleging the contract of suretyship and the non-fulfillment of the construction contract, have made his cause of action. But he was

unable to do this. He pleaded the contract of suretyship and the construction contract upon which it was based, and thereupon in his pleading alleged the abrogation by mutual consent of the plaintiff and the contractor of the original contract of construction. Having alleged this, the condition of the bond, namely, the non-fulfillment of the contract of construction could not arise, because of its abrogation by consent. Of course, a modification in the contract is an abrogation of the original contract, unless the original contract is in itself broad enough to cover the modifications. Assuming, as is assumed by the third point (of the government) for the purposes of argument, that the original contract was not broad enough to cover the changes, the changes, of course, made a new contract, and if the changes had been assented to by the surety—in other words, if the surety had assented that his bond should apply to the modified contract, he made a new contract of suretyship, namely, a bond conditioned upon the non-fulfillment of a different construction contract from that referred to in the original bond. Under these circumstances, if the recovery is to be upon this new contract of suretyship, it should have been pleaded. Otherwise, the plaintiff would not have stated his cause of action.

To say that the defendant, when he is sued upon a certain contract of suretyship which the complaint shows upon its face was abrogated by consent, must in his defense set up that he did not execute some other contract of suretyship which has not, as a matter of fact, been alleged, is a proposition which we do not believe will receive the assent of any court.

Accordingly, in examining the complaint, we find that it alleges that on the 17th of November, 1892, the defendant, Gillies, entered into a contract for the construction of a dock, said contract being appended, and

that the defendant, Freel, executed a bond conditioned upon the performance of the contract of Gillies. It thereupon alleges that the contract of Gillies was changed and modified by certain agreements, which are set forth, and it alleges the liability of all the defendants in a certain sum.

Now, the only contract of the defendant Freel, which is here pleaded is a contract of suretyship conditioned upon the non-performance by Gillies of his contract of the 17th of November, 1892; but it is alleged that new contracts were entered into in 1893 which were a modification of the original Gillies contract—in other words, that the original Gillies contract was abrogated by the consent of the plaintiff and the defendant, Gillies. Under this state of facts, it becomes evident that the plaintiff has no cause of action against the defendant, Freel, upon the original contract of suretyship, for this was conditioned upon the fulfillment of a construction contract which the parties agreed to terminate. Obviously, here there is no cause of action alleged.

The fact that the government and Gillies subsequently made a new contract which reproduced a great part of the former contract—all, in fact, of the former contract, except the specified modifications, does not affect the question. It is, in fact, a new contract. If the plaintiff seeks to recover against the defendant, Freel, as surety upon the new contract, it must plead a contract of suretyship between him and the government as to that contract; and if it fails so to plead it does not allege a cause of action.

All that it has alleged in the complaint and in the record is, that Freel made a contract of suretyship with the government, conditioned upon the faithful performance of the Gillies contract, which contract it states in terms was abrogated. Under these circum-

stances can it possibly be asserted, or could it possibly be directed by any court that it was necessary for Freel, in order to dismiss the complaint, to plead that he did not enter into some contract not stated in the complaint, not anywhere alleged in the action, different from that which is pleaded? There could be no foundation whatever for such a pleading? The defendant cannot be called upon to deny the existence of a contract which is not alleged, and certainly no contract is here alleged, except the original contract of suretyship relating to the original contract of construction.

The claim which we have here made is the familiar contention, supported by innumerable authorities, that a change in the contract releases the surety. The surety has a right to say, when called upon to fulfill his guarantee of the contract after a change: "This change makes a new contract. It abrogates the old contract. I guaranteed the old contract. I did not guarantee the new contract." *Non hæc in foedera veni.*

"No principle of law is better settled at this day," said Mr. Justice Lumpkin, in Bethune *vs.* Dozier, 10 Georgia, 235, "than that the undertaking of the surety being *strictissimi juris*, he cannot, either at law or in equity, be bound further or otherwise than he is by the very terms of his contract. * * * Neither is it of any consequence that the alteration of the contract is trivial, nor even that it is for the benefit of the surety. *Non haec in foedera veni* is an answer in the mouth of the surety from which the obligee can never extricate his case, however innocently or by whatever kind intention to all parties he may have been actuated. * * * He is not bound by the old contract, *for that has been abrogated by the new;* neither is he bound by the new contract, because he is no party to it; neither can it be split into parts so as to be his contract to a

certain extent, and not for the residue; he is either bound *in toto*, or not at all."

Bethune *vs.* Dozier, 10 Ga., 235. Approved in Brandt on Suretyship, 2nd Ed., Vol. 2, p. 566.

POINT VIII.

Demurrer was the proper way in which to raise the contention of the Defendant in Error.

The remarkable contention is made in Point III. of the brief for the plaintiff in error that the demurrer in this case should have been overruled, for the reason that the defense relied upon by the defendant in error should have been set up by answer and not by demurrer. The case relied upon is Shepard *vs.* May, 115 U. S., page 505, where it is stated by Mr. Justice Woods: "But even if it had been shown that Shepard had become the surety of Walker, it was incumbent on the former to show, as a part of his defense, that the indulgence by May to Walker was without his assent. Sprigg *vs.* Bank of Mount Pleasant, 14 Peters, 201; Bangs *vs.* Strong, 7 Hill, 250; S. C., 42 Am. Dec., 64; Cox *vs.* Mobile, etc., Railroad Co., 37 Alabama, 320. There was no proof of want of assent. The defense therefore failed."

It is not difficult to dispose of this case as an authority against the defendant in error:

1. The part of the opinion relied upon is merely *obiter*. The proposition advanced had nothing to do with the decision of the case. It is merely a sugges-

tion as to what principle might have been applicable upon another state of the proof.

2. The cases there cited by the Court do not sustain the principle. The most that can be said of these cases as declaring such a rule is that they were in fact tried, and proof was, in fact, advanced by the surety or guarantor that he did not assent to the changes. No conclusion can be deduced that the burden of proof rested upon him. The cases throw no light on the subject.

In Sprigg *vs.* Bank of Mount Pleasant, cited by the Court in Shepard *vs.* May, Sprigg was seeking relief from liability as surety, when, in fact, by the express terms of his obligation, he was a principal, and it was on proof of his capacity as principal that he was denied relief as surety.

The dictum in Shepard *vs.* May finds no support either in the language of this decision or the principal which the judgment declares.

Bangs *vs.* Strong cited by, the defendant in error upon this proposition, discloses nothing as to which party at the trial offered proof of want of the surety's consent. The opinion merely states: "This agreement was made between the creditors and the principal debtor without the consent of the surety." This conclusion might have been reached if issue had been joined by demurrer, as in the present case. Upon demurrer, the facts alleged in the pleading demurred to. stand, for the purposes of the decision, as admitted, If in the pleading demurred to there is no allegation of consent by the surety, the Court must dispose of the case upon the theory that no consent was, in fact, given. There is no presumption that the surety assented to the changes.

Cox *vs.* Mobile, etc., R. R. Co., 37 Ala., at 320, another case cited by the Court in Shepard *vs.* May, to sustain this dictum, contains no suggestion of the conclusion deduced from it by the Court. It appears that at the trial the surety defendant did, in fact, introduce evidence that he did not consent to the extension granted to his principal, upon a promissory note upon which the action was brought. But the decision in no sense lays it down as a rule of evidence that the burden of making this proof was upon the surety.

These are all the cases upon which the Court bases this dictum. If given the effect for which the Attorney General contends, a new rule of evidence, directly contrary to that laid down by a long line of decisions, would be established. The Court was not required, in order to decide the case on its merits, to declare any rule of evidence whatever. It merely volunteered a suggestion as to what rule might apply in another case.

In this case, the complaint alleges (page 1) that John Gillies and the United States agreed in writing to change and modify the original plans and specifications by two certain contracts made and executed, respectively, on the 16th day of June, 1893, and the 17th day of August, 1893. Consent of the surety is not alleged. By demurrer, the defendant, surety, admitted the changes but denied his liability. This brought squarely before the Court the question: Were the changes of such a nature that the surety was released?

It has repeatedly been held that the burden of proof to show want of knowledge or assent on the part of the surety of alleged changes in the contract, is not upon the surety. It is presumed, in the absence of direct proof to the contrary that the surety has not assented.

In the case of Mundy *vs.* Stevens, 61 F. R., p. 85, it is stated by Mr. Justice Acheson:

> "Nor can we assent to the proposition that the burden of proof was upon the sureties to show that the alteration of the agreement of February 2, 1892, was without their consent. The cases cited in support of this position are inapplicable, for the sureties were not the actors. The plaintiff set forth the supplementary agreement of June, 1892, in his statement of claim, made it part of his case and introduced it in evidence. The burden of proof, therefore, was upon him (Whart. on Ev., 357). We are unable to find in this record any evidence tending to show that John M. Sharp assented to or even had knowledge of the alteration of the agreement."

In the case of United States *vs.* M'Intyre, 111 Federal Reporter, at 597, it is said by Mr. Justice Riner:

> "At the hearing, application was made by the defendant to amend his answer, setting up certain matters with which counsel are familiar, by way of affirmative defense. The Court is of the opinion, however, that this is unneces sary, and we cannot assent to the proposition that the burden of the proof is on the surety to show that the alterations in the contract were made without its consent."

In the case of Tuohy *vs.* Woods, 55 Pac. Rep., 683, the Supreme Court of California, by Mr. Justice McFarland, said:

> "When the surety has shown that the contract as to which he became surety has been changed, he has then shown that there has been an attempt to make him liable *on a new and different contract,*

and the burden is then upon the other party to show that the surety has consented to the new contract."

Again, in the case of Stowell *vs.* Goodenow, 31 Me., at 540:

"The wrong and injury to the surety consists in a change of the contract, and of the relations between the creditor and his principal debtor. It is this which discharges the surety. When proof of it has been made, the creditor can be relieved from the effect of it upon his rights, by saying that the surety has assented or waived all objection to it. The surety could not ordinarily be able to prove that he did not assent to it when made without his knowledge. The proof should come from the party who would be relieved from the consequences of his wrongful act."

The Court of Appeals of the State of New York, in the case of Calvo *vs.* Davies, 73 N. Y., 211, declared the same principle in affirming a judgment in favor of a surety rendered upon his demurrer to the complaint in an action precisely similar to the one here before the Court. In this case the Court said, by Mr. Justice Andrews:

"The plaintiff, in her complaint in this case, sets forth facts which justify a judgment of foreclosure; but she also demands a judgment for any deficiency against the defendant Davies. The defendant Davies interposed a general demurrer to the complaint. The plaintiff avers the making of the bond and mortgage by Davies, its assignment to the plaintiff, the conveyance by Davies to Leslie in November, 1871, of the equity of redemption, subject to the mortgage, and his agreement to pay the same, and the amount due and unpaid thereon.

If the plaintiff had stopped here, a cause of action against the defendant would appear in the complaint; but she further alleges that in November, 1872, by an agreement made by the plaintiff with the defendant Leslie, the time for the payment of the debt was extended from March 8, 1872, to October 15, 1872. * * *

"The agreement, if construed as an absolute agreement for the extension of the time of payment of the mortgage, *prima facie* operated to discharge Davies from liability on his bond. * * *

" The further point is taken by the plaintiff that the averment of the agreement of extension may be rejected, leaving it for the defendant to bring the agreement to the notice of the Court by answer. But we think the whole complaint is to be considered in determining whether it states a cause of action, as well the allegations which tend to discharge the defendant Davies as those which tend to charge him. These views lead to an affirmance of the judgment."

Calvo *vs.* Davies, 73 N. Y., 211.

POINT IX.

The judgment should be affirmed.

James Russell Soley,
Of Counsel.